LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
MAY 13 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 326

In the Matter of Disciplinary Proceedings against

HARRIET BOUSLOG SAWYER, a Member of the Territorial Bar of the Territory of Hawaii,

Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

JOHN T. MCTERNAN,
112 West Ninth Street,
Los Angeles 15, California,
Counsel for Petitioner.

MYER C. SYMONDS,
63 Merchant Street,
Honolulu 13, Hawaii,
Of Counsel.

SUBJECT INDEX

PAGE

Preliminary 1

Point One. The court below had appellate jurisdiction under 28 U. S. C. 1293 on the two independent grounds that this is a case (a) "involving the Constitution . . . of the United States" and (b) wherein the "value in controversy exceeds $5,000.00" 3

Point Two. Respondent misconceives petitioner's argument that the Territorial court was without jurisdiction and fails to show why the Territorial court should not have deferred to the Federal court 8

Point Three. Respondent's effort to show that the finding that petitioner impugned the integrity of Judge Wiig is rationally justified rests upon a misconception of the issues and a distortion of the evidence 13

Point Four. Respondent has presented no basis for denying First Amendment protection to petitioner's speech 19

Point Five. Respondent offers no support for the judgment affirming the holding that the juror interview was gross misconduct 20

Conclusion 22

Appendices:

Appendix A. Motion to dismiss ..... App. p. 1

Appendix B. Motion to reconsider order denying motion to dismiss ..... App. p. 8

Appendix C. Order denying motion to dismiss ..... App. p. 13

TABLE OF AUTHORITIES CITED

CASES	PAGE
Barsky v. Board of Regents, 347 U. S. 442	5
Berryman v. Whitman College, 222 U. S. 334	6
Bitterman v. Louisville and N. R. Co., 207 U. S. 205	7
Board of Education v. Barnette, 319 U. S. 624	4
Bradley v. Fisher, 13 Wall. (80 U. S.) 335	8
Cammer v. United States, 350 U. S. 399	7
Electro Therapy Products Corp. v. Strong, 84 F. 2d 766	6
Garland, Ex parte, 71 U. S. 333	4
Geibel v. State Bar, 11 Cal. 2d 412	8
Glenwood Light & Water Co. v. Mutual Light, etc., Co., 239 U. S. 121	6
Healy v. Ratta, 292 U. S. 263	7
Hunt v. N. Y. Cotton Exchange, 205 U. S. 322	6
Isserman, In re, 9 N. J. 269	11, 12
Konigsberg v. State Bar, 353 U. S. 252	4, 5, 18
Kroger Grocery and B. Co. v. Lutz, 299 U. S. 300	7
McNutt v. General Motors Acceptance Corp., 298 U. S. 178	7
Mercado Riera v. Mercado Riero, 152 F. 2d 86	3
Prensa Insular v. Puerto Rico, 189 F. 2d 1019	3
Rakes v. United States, 169 F. 2d 739	21
Robert Hind Ltd. v. Silva, 75 F. 2d 74	6
Romero v. Puerto Rico, 182 F. 2d 864	3
Sacher v. United States, 182 F. 2d 416, aff'd 343 U. S. 1	11
Scott v. Donald, 156 U. S. 107	7
Schware v. Board of Bar Examiners, 353 U. S. 232	4, 5, 18
Selling v. Radford, 243 U. S. 46	10, 12
Summers, In re, 325 U. S. 561	4
Theard v. United States, 354 U. S. 278	10, 12
Wall, Ex parte, 107 U. S. 265	8
Yates v. United States, 354 U. S. 298	17

U. S. 252, 273.[5] In *Schware* and *Konigsberg* denials of admission to state bars were reviewed and reversed upon assertions of federal questions that included the drawing of arbitrary inferences in violation of due process and abridgement of First Amendment liberties. If the denial by a State of a license to an applicant for admission to the bar can give rise to federal questions properly presented, *a fortiori* with the suspension or revocation of the license of a lawyer already admitted.

(b) This is a case wherein the "value in controversy exceeds $5,000.00."

Petitioner's affidavit under 28 U. S. C. 2108 [R., 622] is uncontroverted. However priceless the maximum value of appellant's right to practice may be, the affidavit establishes for purposes of this proceeding the minimum value of her exercise of that right in sums larger than the statutory minimum.

Respondent contends (R. B., 21) that the value in controversy branch of the statute has no application here since petitioner's "privilege to hold her license" cannot be assigned any value. But respondent overlooks those cases

---

[5]See also, anent suspension of a state medical license, *Barsky v. Board of Regents*, 347 U. S. 442, where multiple claims of denial of due process were reviewed here, conceives that petitioner's claim to be that she was denied procedural due process. Petitioner has never contended in this litigation that she was denied fair notice and opportunity to be heard. Her claim of denial of due process of law (O. B., Point One, pp. 30-50) is confined to an assertion of arbitrary fact finding. She has never in this litigation raised any other due process point, and respondent's dreary recital of the procedural steps before the Territorial Court and its Legal Ethics Committee, as well as that in the opinion of the Territorial Court [R., 95-115], is quite irrelevant to any position urged by petitioner.

holding that where the litigation does not directly involve money or some specific subject matter of ascertainable value, the test is the value of the use of the subject matter of the litigation. This principle—sometimes formulated as the value of the subject to be concluded by the decree—applies precisely in those situations where it is impossible to fix a precise upper limit on the value. This is familiar law under the cognate statutes (28 U. S. C. 1331, 1332) conferring jurisdiction upon the United States District Courts. *Hunt v. N. Y. Cotton Exchange,* 205 U. S. 322; *Glenwood Light & Water Co. v. Mutual Light, etc., Co.,* 239 U. S. 121; see also, *Berryman v. Whitman College,* 222 U. S. 334, to the effect that jurisdiction is "measured by the value of the right to be protected." Similar cases are collected in 30 A. L. R. 2d 602, 627-628, see also 621-626.

In applying Section 1293 the court below has adopted the same principle. This it did in the case at bar on petitioner's application for stay. [R., 624.] See also in *Robert Hind Ltd. v. Silva,* 9 Cir., 75 F. 2d 74. That was an appeal from a judgment cancelling a release given for $84.50. The injured party had also brought an action for $25,000 on account of his injuries. The court took jurisdiction since, "Clearly the right of appellant to use the release as a complete defense to an action for $25,000 damages exceeds $5,000." (*Id.,* p. 76.) In the related field of amount in controversy for purposes of jurisdiction of the District Courts, the court below has similarly measured that amount by the "right which appellant asserts and seeks to have protected and enforced." *Electro Therapy Products Corp. v. Strong,* 9 Cir., 84 F. 2d 766, 767.

This Court has recently held that, whatever other attributes attend the holder of a lawyer's license, he is engaged in a business. *Cammer v. United States,* 350 U. S. 399. It would therefore seem that this right is as capable of evaluation in terms of the income its exercise produces as any other business. Where the action complained of in the litigation effects the suppression or restriction of a business, the value of the right to do the business or of the injury to it is the matter in controversy. That value is measured, in the case of destruction of the business, by the total investment therein, or, in the case of restriction, by the amount of the business lost thereby. *Scott v. Donald,* 156 U. S. 107, 114, 115; *Bitterman v. Louisville and N. R. Co.,* 207 U. S. 205, 224, 225; *Healy v. Ratta,* 292 U. S. 263, 269; *McNutt v. General Motors Acceptance Corp.,* 298 U. S. 178, 181; *Kroger Grocery and B. Co. v. Lutz,* 299 U. S. 300, 301. Whatever other effect the judgment of disbarment will have upon petitioner, it will deprive her of her license to engage in business for more than a year.[6] At the very least this is what Mr. Justice Stone in *Healy v. Ratta, supra,* called "restriction" of petitioner's business. Her resultant loss thus exceeds $5,000.00, and by the cases just cited this is the value in controversy in this litigation.

The showing satisfies the jurisdictional amount prescribed in the statute.

---

[6]Petitioner will not be eligible for reinstatement automatically upon the end of her suspension. Only after the year's suspension has been completed is she then able to take the "examination as though applying for admission to the bar." See Rule 15(d) of the Territorial Court. (O. B., App., 84.) Obviously much more time would pass until the examination could be given and the results obtained. Counsel are informed that bar examinations are given but once a year in Hawaii.

POINT TWO.

Respondent Misconceives Petitioner's Argument That the Territorial Court Was Without Jurisdiction and Fails to Show Why the Territorial Court Should Not Have Deferred to the Federal Court.

1. Respondent asserts (R. B., 40) that petitioner's position is in effect that "as long as petitioner misconducts herself on the federal side of the street, it is none of the Territory's business." To this we say that it depends on the kind of misconduct. We do not question the right of any licensing court to try and discipline one of its attorneys upon charges of well-defined and universally condemned offenses wherever committed. Thus, initiating vexatious and ill-founded litigation, representing adverse interests, aiding non-lawyers to practice law and participating in the mulcting of uninformed clients to carry on such activities (see *Geibel v. State Bar,* 11 Cal. 2d 412, cited R. B., 46) are such offenses. They are destructive of good character and harmful to the public interest in an honest and reliable bar. Wherever committed, and with relation to whatever court, any licensing court should initiate disciplinary proceedings against the lawyers participating.

But here the conduct is qualitatively different. Whether it is an offense at all turns on both petitioner's relationship to the federal court and the impact of her conduct upon the case in the federal court.[7] The interview, post verdict, of the trial juror was an offense only if the court where the juror served made it so. Surely it is for the federal

---

[7]In addition, the gravity of the offense and the discipline, if any, needful to protect the integrity of the bar and the administration of justice (see, *Bradley v. Fisher,* 13 Wall [80 U. S.] 335, 354; *Ex parte Wall,* 107 U. S. 265, 288) most certainly would be governed by these factors.

judicial system to determine whether it will prohibit all lawyers, on pain of severe discipline, from interviewing trial jurors in the federal courts after verdict has been rendered in a case pending in that court. It is not for the Territorial Court to prescribe protections for federal jurors serving in federal cases. Such a determination involves considerations related to protecting the inviolability of the jury room and to ferreting out conduct which corrupts or otherwise beclouds the processes of justice. These are difficult and complex questions and different courts may well strike the balance between the competing interests at different points. The resolution of such issues would seem to be inseparable from the responsibility of the court wherein the conduct occurred (here the federal court) to regulate and control its own functioning.

This Court may well decide that in the federal system the fair administration of justice and the protection of accused and convicted individuals call for a rule that permits (if it does not require) lawyers to interview the trial jurors, post verdict, on any reasonable information indicating a tainted verdict. In such circumstances, for the Territorial Court to assert an autonomous power so as to prescribe for its licentiates "a standard of conduct . . . to be followed and observed by such Hawaii attorneys in any jurisdiction, local, state or federal" (R. B. 43) is *pro tanto* to usurp the federal court's power and obstruct its proceedings. The Hawaii attorney in following the federal rule in federal litigation would be disciplined by the Territorial Court. In such circumstances he would either be effectively deterred from doing what the federal courts deem necessary to their administration of justice or he would be gravely penalized for having done so. Such a state of affairs would seriously obstruct the relationship

of the federal court bar with the administration of justice in that court.

Viewed in another light, the Territorial Court's discipline of petitioner for the juror interview would create a stultifying anomaly. The federal court in Hawaii now has pending disciplinary proceedings against petitioner;[8] these proceedings rest solely upon the Territorial Court's judgment herein. Under the rule of *Selling v. Radford,* 243 U. S. 46 and *Theard v. United States,* 354 U. S. 278, the federal court will be called on to examine the record in the Territorial Court matter to determine *inter alia* whether grave reason invokes the duty "not to [discipline] except upon conviction that, under the principles of right and justice, we [are] constrained to do so." (243 U. S. at 51.) At this juncture the District Court (or its supervising courts on appellate review) might well adopt the policy concerning juror interviews urged here by petitioner. (O. B., 64-67.) Should that occur, petitioner would stand disciplined by the Territorial Court for conduct in a federal case in the federal court which that judicial system finds blameless.

Similar reasoning applies to the Honokaa speech. Since the charge was showing disrespect for the federal court, it was for that court to decide whether the speech interfered with its ability to maintain public respect or was subversive of its administration of justice. Petitioner's remarks on their face were not of this quality; she did not call Judge Wiig a crook or charge him with being the

---

[8]They are referred to at R. B., note 8, p. 41, and note 9, p. 44.

tool of political interests—utterances which, like the offense of bribery or misappropriating client's funds, are universally understood and condemned as incompatible with the lawyer's duty to the court. (See O. B., 44-48, notes 30-32.) Rather was this speech a criticism of law enforcement methods and the conduct of the trial of a criminal case, which, in express terms, laid no reflection against the trial judge's integrity. Whether this speech was offensive in the manner charged against petitioner turned upon her statements themselves, their meaning in the context of the trial and their impact upon that trial. Such an evaluation would also take into account petitioner's relationship to the court wherein the trial was pending and the policy of that court toward public discussion of cases there pending. Manifestly, all these were matters for the court affected to consider and evaluate in the first instance. If the Territorial Court is to be able to lay down a universal standard of conduct (R. B., 43) in this area, it may well bring about the same anomaly that was indicated above in connection with the juror interview.

2. Respondent completely misreads the *Isserman* case. (R. B., 42-43.) There, as here, the quality of the attorney's conduct turned on his relation to the federal case and the federal court. New Jersey withheld action until the federal courts had evaluated that conduct. (See *Sacher v. United States,* 2 Cir., 182 F. 2d 416, aff'd 343 U. S. 1.) Only then did New Jersey act and in doing so it based its discipline solely on the contempt judgment of the

federal court.[9] While New Jersey applied its "standards of practice," it did so only as respects an offense against the federal court. It let the federal court first determine whether an offense had been committed against it. In the case at bar, Hawaii should have deferred to the federal court on the question of whether petitioner had offended that court. If the offense had been found, Hawaii could then, as New Jersey did with *Isserman*, determine the effect thereof on petitioner's right to practice in its courts.

3. Plainly *Selling v. Radford* and *Theard v. United States, supra*, do not apply here. (See R. B., 45-47.) At bar, review is sought of action claimed to deprive petitioner of constitutional protection. As already observed, no local autonomy in our system operates outside the restraints of the Constitution. *Selling* and *Theard* deal with the conclusiveness, in a federal disbarment proceeding based on a state disbarment, of the state judgment of disbarment. That question is not presented here.

---

[9]The opinion of the New Jersey court makes this abundantly plain:

> "There is no occasion to look behind respondent's conviction. His guilt of contempt has already been found and determined by a court of competent jurisdiction and his conviction affirmed on appeal by two courts. We must necessarily accept his conviction as a fact and for purposes of imposing discipline consider only the result of the criminal or quasi-criminal proceeding. . . ." *In re Isserman*, 9 N. J. 269, 277.

On rehearing the New Jersey court stated that the disbarment it imposed was for appellant's "conviction and sentence for contempt," and that it limited its "inquiry and consideration to the question of whether that conviction merits discipline." *In re Isserman*, 9 N. J. 319, 320, 321.

POINT THREE.

Respondent's Effort to Show That the Finding That Petitioner Impugned the Integrity of Judge Wiig Is Rationally Justified Rests Upon a Misconception of the Issues and a Distortion of the Evidence.

1. The issue here is whether petitioner's Honokaa speech was an "attack upon the administration of justice" and "impugned the integrity of Judge Wiig." On this the evidence must not merely rationally support such conclusions, it must be clear and convincing. (See O. B., 42, 43.) Evidence that petitioner spoke about the *Fujimoto* trial and was critical of its conduct—even that she criticized actions of the judge himself—does not of itself rationally support the conclusion that she called into question the judge's integrity.

Respondent's argument in large part is an effort to prove that petitioner reflected on Judge Wiig's probity by showing that she spoke about the conduct of the trial in *Fujimoto*. (See R. B., 3-13, 51-54.) In her opening brief (O. B., 34) and here again petitioner's position is that the Honokaa speech did refer to and was largely of and concerning the *Fujimoto* trial. But the problem is not whether petitioner spoke about the trial or the conduct of the trial judge. Rather is it what she said about the latter and whether that amounts to a charge of lack of integrity. Respondent's handling of the evidence of what petitioner said and its efforts to make of that the offense found constitute a distortion of the record.

2. Respondent's efforts to prove that peitioner's remarks impugned the integrity of Judge Wiig rest largely upon the following quotation from the Matsuoka notes:

> "There is no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the government can't make a case. . . .
>
> "There's no fair trial in the case. They just make up the rules as they go along." [See R. B., 56; R., 577.]

What respondent presents as a single excerpt actually consists of two excerpts separated by over a page of Matsuoka's notes. [See R., 577.] Respondent omits reference to the context preceding and following the first of these excerpts. That which precedes explains the reference to the lack of fair trial as the result of government propaganda and F.B.I. tactics in pressuring witnesses. [R. 576, 577; O. B., 36, 37.] The context following the first excerpt explains the scrapping of the rules as the use of the hearsay exception admitting the declarations of co-conspirators who never knew or saw the defendants—as contrasted with the exclusion of such declarations in trials for the substantive offense such as *Majors-Palaluko*. [R., 577; O. B., 37, 38.] Respondent also ignores that this context expresses a theme struck early in her talk: "Conspiracy means agreement. Government never has used conspiracy when it has a case. When it hasn't got enough evidence, it lumps a number together and says they agreed to do something." [R., 574.] Viewed in all this context the portion of the first excerpt dealing with scrapping the rules would rationally appear to mean that the government

was taking advantage of the hearsay exception in conspiracy cases to prove a case it could not otherwise establish.

The second excerpt in the quote devised by respondent also has a context which comes before and after it. We have discussed this context and the meaning it imparts to the quoted words. (O. B., 38, 39.) Respondent ignores the context and fails to meet our argument.

Having torn these excerpts out of context and tacked them together, respondent then inserts words, found nowhere in the evidence. Thus respondent renders the language, "There could be no fair trial in the Smith Act case *because* all the rules of evidence have to be scrapped *so* the Government could make its case and the rules of evidence and procedure were made up as the case proceeded." (R. B., 57, 58.) Nowhere in the record is there any testimony to the effect that petitioner said the trial was unfair "because" the rules of evidence had to be scrapped, etc. Nor is there any testimony that the rules are being scrapped "so" (*i.e.*, "in order that") the Government could make "its" case. All this is respondent's invention. It seeks to attribute to petitioner language which ascribes partiality and favoritism to Judge Wiig. The language taken from the Matsuoka's notes contains no such words. So far as the evidence is concerned, no such words were used by petitioner. Respondent's argument is a process of interpretation by interpolation to reach a predetermined end. It rests not merely on dubious evidence but on no evidence.

Finally, respondent contends that the excerpts in question must refer to Judge Wiig because only he ruled on the evidence and made up the rules.[10] (R. B., 61, 62.) But this contention derives force only from respondent's interpolations into the evidence. *In context* it is at least equally reasonable to conclude that, anent the scrapping of the rules, petitioner's remark was that in any Smith Act case the Government can make a case only by taking full advantage of the broadest admissibility for hearsay afforded by a conspiracy trial, and that, concerning making up the rules, she said the Government continually presses for broadening the rules from one case to the next. Absent language ascribing to Judge Wiig a purpose to aid the Government in *Fujimoto*—and no such language is found in the evidence here—the nature of this case (see O. B., 43, 44) requires taking the reasonable, exculpating interpretation. This would seem imperative in view of the testimony of the witnesses on this part of the speech, four of whom recall petitioner's remark as attributing the conduct in question to the "government" and two of whom recall it as "they." (O. B., 39.) None gave the remark so as to attribute the conduct to Judge Wiig.

3. Similar gloss by interpolation and reading excerpts out of context characterizes respondent's treatment of the

---

[10]Here again respondent misquotes the evidence. It attributes to petitioner the words "the rules of evidence and procedure were made up as the case proceeded." (R. B., 58, 62.) According to Matsuoka's notes, it was "they just make up the rules as they go along." [R., 577.] The latter (in context as already developed) is a generalized statement about Government tactics. Respondent's interpretation-by-interpolation is calculated to make the remark apply only to the judge in *Fujimoto*. The Territorial Court found the remark to have been made as respondent sets it out. [R., 117.] The court below made no finding as to this remark. [R., 561.]

remark about "a new crime." The remark shown in the evidence is not as quoted by respondent. (R. B., 62.) As shown by the Matsuoka notes, it was, "unless we stop the Smith trial in its tracks here, there will be a new crime. People will be charged with knowing what is included in books, ideas." [R., 577.]

Respondent claims that this is a charge that the judge was "encouraging new crime . . . unless [his conduct is] stopped in its tracks." (R. B., 63.) Nothing could be more unreasonable. Obviously the remark as shown in the evidence is that Smith Act prosecutions, based as was the *Fujimoto* case on books,[11] will result in making a crime —viz., violation of the Smith Act—out of reading and thinking. The language which follows this excerpt—dealing with reading as it was treated in the Los Angeles Smith Act trial[12] and the dangers to reading, intellectual freedom and free speech—makes this construction inescapable.

4. Respondent's position throughout this point comes down to these propositions: Because petitioner spoke about the *Fujimoto* trial, she spoke about Judge Wiig; because she spoke critically about the conduct of the trial, she attacked Judge Wiig; because she "attacked" Judge Wiig, she impugned his integrity. The reasoning is fallacious at each step. Petitioner did indeed speak about the *Fujimoto*

---

[11]This is a theme sounded often in the speech. See, ". . . men in power are trying to put men in jail because of their thoughts and books written before he was born." [R., 574.] "One of the reasons Jack Hall is on trial is because it is said he once got a book. . . ." [R., 574.] "Witnesses testify what government tells them to just as they read portions of books like overthrow the government and leave out the rest. . . ." [R., 576.] The duffel-bag of books incident. [R., 576.]

[12]*Yates v. United States,* 354 U. S. 298.

trial; that in doing so she did not necessarily speak of Judge Wiig appears from the most casual reading of Matsuoka's notes. Petitioner spoke critically of the conduct of the trial and Matsuoka's notes show that this was not criticism of Judge Wiig's conduct except to the extent that she said that Judge Wiig gave the Government the evidential latitude which the conspiracy rules permit. Reason surely forbids respondent's central proposition that to criticize a trial judge is to "attack" him and impugn his integrity. Respondent's position would require that any attorney's comment (other than praise) on a judge's conduct of a trial be made at the peril of discipline. When that day comes, the temple of justice will lose a most salutary corrective.

5. Respondent's contention that the findings of the two lower courts are here entitled to "presumptions in favor of correctness" are plainly misdirected. (R. B., 65.) Petitioner does not ask this court to resolve issues of fact or determine questions of credibility. Petitioner's case here rests on the prosecutor's evidence against her. She claims that this evidence is too insubstantial to support the key inferences of impugning integrity and attacking the administration of justice. Given the constitutional protections asserted and the standard of proof here operative, the solidity of the evidence and the reasonableness of the findings are open to independent examination by this court. *Schware v. Board of Bar Examiners,* 353 U. S. 232; *Konigsberg v. State Bar,* 353 U. S. 252. For other cases see, O. B., 42, 43.

POINT FOUR.

Respondent Has Presented No Basis for Denying First Amendment Protection to Petitioner's Speech.

1. Stripped to its essentials, respondent's argument is that petitioner's speech offended Canon One and is therefore not entitled to First Amendment protection. If there were no question that petitioner had impugned Judge Wiig's integrity, this position might be supportable. The primary question is did the speech so offend? On this point respondent ignores the quality of proof which the First Amendment demands. The imperatives of free public discussion require a clearness, an unambiguity, a convincing quality which this record here does not provide. The speech on its face did not in terms attack the Judge's integrity. The evidence contains no showing of words or circumstances that make out a clear or imminent risk that Judge Wiig's integrity would stand impugned before the public. Nor does it show a peril, clear or present, that public confidence in the court would otherwise be impaired. Indeed it is only with the most strained construction that any danger to legitimate concerns of judicial administration can be raised from this evidence. Surely upon a balancing of all factors (see O. B., 59-61) it cannot be said that the showing here is enough to justify abridgement of speech.

2. It is of a piece with respondent's faulty premises that it claims that to apply the clear and present danger test would "nullify" Canon One. (R. B., 80.) The issue here is not a choice between freedom of expression on the one hand and Canon One on the other. The latter defines the interest of the state against which free speech is to

be weighed. Respondent's failure to attempt to strike a balance between them betrays the defect in its position. For in that process respondent would be required to weigh the *actual* words used and the actual circumstances of their use and to assay the likelihood of immediate and serious harm to the public confidence in the courts. Respondent has chosen to rely on its own *ipse dixit,* which in turn rests upon its distortion of the evidence above reviewed, that petitioner "attacked" the integrity of Judge Wiig. By First Amendment standards, respondent has offered no ground for curtailing petitioner's speech.

3. Respondent presents no authority to show that the lawyer of record, while the case is pending, is under restraint not to engage in public comment. We take it then that the position advanced in petitioner's opening brief (pp. 55, 56), that the only limitations imposed upon the lawyer of record during the pendency of the case are those applicable to lawyers generally, is not controverted. Apparently there is no authority in American law for the holding of the court below [R., 565, 566] to the effect that during the trial the lawyer of record is under "restraints" not otherwise applicable.

POINT FIVE.

Respondent Offers No Support for the Judgment Affirming the Holding That the Juror Interview Was Gross Misconduct.

1. Respondent's brief leaves great uncertainty as to what it conceives the misconduct to have been. It is not clear whether respondent claims that petitioner "grossly misconducted herself" in that she searchingly interrogated the juror about matters occurring in the jury room, or in-

terrogated him when he was ill, or interrogated him when others were present,[13] or filed an untruthful affidavit. (See R. B., 85-88.) The original charge, as amplified by a bill of particulars, was that petitioner had transgressed the standards laid down in Opinion 109 and *Rakes v. United States* (D. C. C. A.), 169 F. 2d 739. [R., 13.] These two citations deal only with post verdict interviews as such. It is therefore inescapable that petitioner was tried only on the charge of having conducted such an interview. All else is respondent's belated embroidery. It has nothing to do with the charge on which petitioner was tried or the findings which underlie the conclusion of gross misconduct. The Territorial Court's finding was of misconduct consisting of repeated visits and studied interrogation. [R., 119-121.] And this was affirmed below. [R., 568.] We therefore take it that the issue here is only whether it is misconduct in the federal court for federal attorneys to interview jurors in federal cases, post verdict, concerning matters occurring in the jury room when these matters pertain to possible mental imbalance or frameup or other wrongdoing affecting the jurors. Respondent's introduction of other issues at this late date cannot serve to mask the question presented for decision.

---

[13]Respondent's description of "petitioner, with her client, Jack Hall, Joseph Kealalio, President of the ILWU, and Grace Oshiro, an ILWU steward, together with Ellen Cabreros, an ILWU member, in toto, harassing an admitted 'gravely ill' man" (R. B., 85) is utter distortion. Petitioner first saw the juror at the request of his sister (Ellen Cabreros) and in the presence of his family and the sister and her "girl friend" (Grace Oshiro). [R., 212, 316.] On the other two occasions, in addition to Hall and petitioner on the second occasion and Hall, petitioner and Kealalio on the third, the juror's wife and daughter were present. [R., 386, 485, 215, 217, 390.] It is wholly misleading to give the impression that the juror interview was conducted with the juror surrounded by a large group of unfriendly people.

2. On the point at issue respondent claims that "later pronouncements of this Court" vitiate petitioner's position (R. B., 92.) Respondent cites no such cases. The rule of the *Hyde* and *MacDonald* and the other authorities cited by petitioner (O. B., 66) are plainly necessary to the sound administration of justice and clearly applicable to the circumstances of this case. This is not a question of impeaching a verdict by narration of the juror's thought processes or of insulating the jury room from outside influences. Rather it is one of the right and duty of counsel and court to investigate substantial possibilities of a tainted verdict.

Conclusion.

For all the reasons indicated in petitioner's opening brief and this brief, the judgment of the lower courts should be reversed and vacated.

Respectfully submitted,

JOHN T. MCTERNAN,
Counsel for Petitioner.

MYER C. SYMONDS,
Of Counsel.

APPENDIX A.

In the Supreme Court of the Territory of Hawaii.

In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an Attorney at Law.

Motion to Dismiss.

Addressed to Supreme Court of Territory of Hawaii.

Respondent, by way of return to the order to show cause issued herein on July 8, 1955, moves to dismiss the order to show cause upon the following grounds:

1. This court is without jurisdiction to discipline respondent regarding the matters set forth in the report of the Legal Ethics Committee in that:

a. The alleged facts in the "Report of the Legal Ethics Committee" are insufficient to give this court jurisdiction over respondent.

b. The alleged matters complained of arose out of legal proceedings in the Federal Court and not in connection with any legal proceeding pending in any court over which this court has jurisdiction.

2. The proper forum for disciplinary proceedings, if any was warranted, was the United States District Court for the District of Hawaii as the alleged improper conduct occurred in connection with a case pending in that Court.

3. This proceeding is not authorized by the rules of this court in that at the time the alleged conduct is said to have occurred in December 1952 and July 1953, neither the Bar Association of Hawaii nor its executive committee was authorized or empowered to institute complaints against attorneys.

4. It is unjust and a violation of due process of law to give *ex post facto* operation to the April 21, 1954 amendment to Rule 19 of this Court by requiring respondent to answer a complaint brought by the Executive Committee of the Bar Association of Hawaii involving alleged conduct occurring in December 1952 and July 1953 before said amendment authorized and empowered the Bar Association to initiate disciplinary proceedings.

5. These proceedings deny to respondent equal protection of the laws guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States in that:

a. Comments of others directly and indirectly tending to bring about the unfair administration of justice to the prejudice of defendants represented by respondent in the same court action out of which the alleged comments arose did not result in charges or contempt proceedings. See following comments and statements made and published during progress of the case of *United States v. Fujimoto et al.*, copies of which are attached: (1) press release of the Attorney General of the United States, August 28, 1951 (Ex. A); (2) Honolulu Star-Bulletin editorial, Tuesday, January 20, 1953, "Never Trust a Communist" (Ex. B); (3) Honolulu Star-Bulletin editorial, January 22, 1953, "The Long Arm Closes—Once More" (Ex. C); (4) "Stalin's Plot Against America," series of eight articles by Fletcher Knebel in Honolulu Star-Bulletin, March 25, 1953 through April 2, 1953 (Ex. D).

b. Affidavits and motions have been filed in litigation in territorial courts, over which this court has plenary power, charging false and scandalous statements and an attempt to flout the authority of the court and usurp its functions by attorneys under oath or in court pleadings without any proceedings being taken against the attor-

neys so charged or against the attorney making the charge. See *In Re Trust Estate of Wallace R. Farrington,* Civil No. 139 in the Circuit Court of the First Judicial Circuit, Motion of William F. Quinn filed January 5, 1955 and affidavit of E. C. Moore, Jr. filed January 11, 1955, excerpts from which motion and affidavits are attached hereto (Ex. E).

c. No other attorney admitted to practice by this court since the creation of this court by the Hawaiian Organic Act has, so far as respondent has been able to determine, been proceeded against by this court for comment about or conduct in proceedings in the United States District Court of the District of Hawaii.

d. No other attorney admitted to practice by this court since the creation of this court by the Hawaiian Organic Act has, so far as respondent has been able to determine, ever been proceeded against for out of court comment on judicial proceedings where such comment did not obstruct or tend to obstruct justice or constitute contempt per se.

e. It has been the practice in the courts of this jurisdiction from time immemorial to permit the filing of affidavits of jurors after their verdict in connection with motions for new trials and to permit the filing of affidavits of attorneys respecting conversations with jurors after verdict, and to permit jurors after verdict to discuss their deliberations—if they chose—with attorneys, the press or members of the public, and to permit attorneys to discuss with jurors after their verdict matters occurring during the trial and during their deliberations to determine whether the verdict was lawfully and properly arrived at, and no other attorney in this jurisdiction, so far as respondent has been able to determine, has ever been proceeded against for interviewing a juror after verdict and filing with the court an affidavit of the substance of that interview.

6. It appears from the face of the record that the alleged grounds for discipline are barred by laches.

7. The "Report of the Legal Ethics Committee" attached to the order to show cause does not set forth facts sufficient to constitute grounds for discipline.

8. It appears from Paragraph II of the Complaint under Rule 19 dealing with the Honokaa speech, and from the report, that the alleged words of respondent are protected by the right of free speech guaranteed by the First Amendment, and that the utterance of these alleged words under the circumstances shown did not constitute an obstruction of justice, which created a clear and present danger necessary to remove the constitutional protection from said speech.

9. It does not appear from Paragraph II of the Complaint under Rule 19 dealing with the Honokaa Speech, nor from the report, in what respects respondent was guilty of violation of Canons 1 and 22 as charged in that:

a. The report fails to set forth any facts showing that the alleged words of respondent were not protected by the First Amendment to the Constitution of the United States.

b. The report fails to show that respondent intended to interfere with the administration of justice or any reasonable probability that the alleged statements would have such an effect.

c. The report fails to set forth any facts that the alleged words of respondent constituted unjust criticism prohibited by Canon 1."

d. The report fails to set forth facts showing that the alleged words of respondent indicated a disrespectful attitude towards the courts prohibited by Canon 1.

e. The report fails to set forth whether the alleged words of respondent were true or untrue.

f. The report fails to show by what means or in what manner the alleged words of respondent were not characterized by candor and fairness as required by Canon 22.

10. It does not appear from the report by what means or in what manner the alleged words of respondent imputed to the Judge unfairness in the conduct of the Honolulu trial.

11. It does not appear from the report by what means or in what manner the alleged words of respondent impugned the integrity of the local federal court.

12. It cannot be ascertained from the report what other comments were made by respondent at Honokaa that imputed to the Judge unfairness in the conduct of the trial and impugned the integrity of the local federal court.

13. The alleged words of respondent as set forth in the report differ from the words attributed to respondent in quotes by complainant's witness, Yoshio Matsuoka, in the Hilo Tribune Herald for December 15, 1952, a copy of which is in evidence, in the following material respects: whereas the report, without quotes, alleges respondent said "horrible and shocking things were going on at the trial; that there was no fair trial in the case; that they just made up the rules as they went along; that unless the Smith Act trial was stopped in its tracks in Honolulu there would be a new crime," Witness Matsuoka quoted respondent as follows:

> Mrs. Bouslog, speaking for a half hour, spoke of "some rather shocking and horrible things that go on at the trial."
>
> There is "no such thing as a fair trial in a Smith Act case," she charged. "All rules of evidence have to be scrapped or the government can't make a case.

> They just make up the rules as they go along," she told her listeners.
>
> "Unless we stop the Smith Act trial in its tracks here," there will be a "new crime—that of knowing what's in books," and will lead to the "Dark Ages of thought control," she asserted.

Even assuming the accuracy of the quotations of complainant's witness as above set forth, the statements attributed to respondent constituted fair comment, are protected by the First Amendment, and are not a violation of any Canon of Ethics.

14. Assuming the accuracy of the quotations, they say in substance no more than what was already in the record of the trial and theretofore made public.

15. It does not appear from Paragraph III of the Complaint under Rule 19 dealing with the Fuller affidavit or from the report:

a. In what respects the affidavit of respondent did not fully disclose to the court the condition of Mr. Fuller.

b. In what respect the failure to report to the court that an attempt had been made to get an affidavit from Mrs. Fuller, who refused to sign one, constitutes basis for discipline.

c. In what respect the Committee considers the affidavit filed insufficient to apprise the court that no affidavit was obtained from Mr. Fuller because of his condition.

16. It does not appear from Paragraph III of the Complaint under Rule 19 dealing with the Fuller affidavit, or from the report, that respondent intended to interfere with the administration of justice or any reasonable probability that the filing of the affidavit would have such an effect.

17. The report is ambiguous, unintelligible and uncertain in that it cannot be ascertained therefrom, nor does it appear therein, whether with reference to the Fuller affidavit the Committee is recommending discipline because respondent interviewed the Juror Fuller in addition to the charges in Paragraph III of the Complaint.

18. The Committee is recommending discipline based upon a charge not contained in the Complaint in that Paragraph III of the Complaint dealing with the Fuller affidavit charges respondent with unprofessional conduct in interviewing a juror known by her to be indisposed, whereas the report of the Committee recommends discipline because of the additional ground of failure to disclose to the court that respondent had attempted to get an affidavit from Mrs. Fuller who refused to sign one and could not get an affidavit from Mr. Fuller because of his condition.

Wherefore, respondent prays that the order to show cause be dismissed.

Dated: Honolulu, T. H., this 19th day of October 1955.

HARRIET BOUSLOG, Respondent
By Myer C. Symonds
Myer C. Symonds
Her Attorney

(Documents marked Exhibits A through E attached to the above motion and supporting Memorandum of Points and Authorities omitted.)

APPENDIX B.

3044

In the Supreme Court of the Territory of Hawaii.

In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an Attorney at Law.

Motion to Supreme Court of Territory of Hawaii to Reconsider Its Order Denying Motion to Dismiss.

Now comes respondent and moves this Court to reconsider its order entered herein on November 3, 1955, denying the motion to dismiss. As grounds therefor respondent alleges that the order of the Court is contrary to law in that:

a. No adjudication was made by the United States District Court for the District of Hawaii with respect to whether the conduct of respondent regarding the Honokaa speech or the Fuller affidavit constituted grounds for discipline.

b. Civil Rule 1(d) of the Federal Court for the District of Hawaii specifically provides for discipline of an attorney by that court "for good cause shown and after an opportunity has been given to be heard."

c. The alleged misconduct of respondent having occurred in the Federal Court it is an interference with and usurpation of the power thereof for this Court to entertain disciplinary proceedings regarding conduct involving that court.

d. The entertaining of jurisdiction of the issues involved by this Court constitutes an interference with the administration of justice in the Federal Court.

e. In *Ackerman v. ILWU et al.*, 187 F. 2d 860 (cert. den. 342 U. S. 859, 96 L. ed 646), the Bar Association of

Hawaii, the complainant herein, filed Brief of Amicus Curiae in the United States Court of Appeals for the Ninth Circuit, seeking to reverse judgment of a three-judge court sitting in the Federal Court in Hawaii, enjoining further proceedings in the territorial courts, upon the ground that the judgment constituted an interference by the Federal Court with the independence of the territorial court. On page 3 of its brief, signed by officers of the Bar Association, including W. B. Stephenson, the present president of the Bar Association, and Edward N. Sylva, present Attorney General for the Territory and one of the prosecutors in this proceeding, it is stated:

> Since these determinations seriously affect the jurisdiction of the courts of the Territory of Hawaii as components in an independent judicial system, The Bar Association of Hawaii desires to direct its brief to the question of the relative jurisdictions of the territorial and federal courts, the relationship between them and the dependence upon, or independence of, one judicial system to the other.

f. The foregoing position of the Bar Association demonstrates the inconsistency of its position herein. The Bar Association contends herein that without any determination by the Federal Court that the conduct of respondent constituted a basis for discipline after hearing in accordance with the rules of the local Federal Court, this Court has jurisdiction to hear the testimony and determine whether alleged conduct in the Federal Court, which is according to the Bar Association "an independent judicial system," should be disciplined.

g. The determination of this Court, by a divided court, that it has jurisdiction to proceed further regarding the Fuller affidavit, constitutes an interference with the juris-

diction of the Circuit Court for the Ninth Circuit which has jurisdiction over all issues involving the Fuller affidavit by reason of the appeal now pending in that court. Point VII of the appellants' Brief in the Fujimoto appeal contains the following assignment of error:

> The trial court erred in denying appellants' supplemental motion for a new trial without a hearing on the ground that acts and declarations of Juror Fuller were inadmissible as a matter of law.

Appellants' reply brief in the appeal, pp. 166-167, demonstrates that there is squarely before the Court of Appeals all questions sought to be raised by the Bar Association complaint.

> Appellants sought a chance to offer evidence to prove these matters, setting forth in their moving papers in affidavit form a *prima facie* showing which intitled them to a hearing. The appellee opposed the hearing. The court foreclosed it. If the verdict was properly arrived at, if in fact it was not based on coercion, intimidation, fear, passion and prejudice, those facts would have appeared of record had the court permitted appellants to proceed with their offered proof on the day the motion came on for hearing.
>
> . . .
>
> If the facts stated in Attorney Harriet Bouslog's affidavit were in any way misleading, unfairly stated, false, or made by Juror Fuller when he was irrational, or if the facts did not coincide with reality, as the Government intimates, a prompt hearing accorded appellants, or an investigation made by the court, would have determined the facts . . .

h. The relief sought in the appeal is to have the local Federal Court hold a hearing to determine the facts and

issues raised by the motion for new trial supported by the Fuller affidavit.

i. For this Court to pass upon whether the Juror Fuller was "gravely ill," as found by the Bar Committee, when interviewed by respondent would constitute an usurpation of the function of the Federal Court in the event of a reversal on appeal for failure to conduct a hearing on the Fuller affidavit.

j. The Fuller affidavit was filed with the local Federal Court and the court passed upon the pertinency of the affidavit. Therefore this Court is being asked to pass upon the ethics involved in connection with a matter squarely presented to the Federal Court, a matter on which the Federal Court failed to act although it had power of contempt, discipline or grand jury action if any of the foregoing were warranted. To take jurisdiction of the Fuller affidavit squarely violates the position of the Bar Association in its amicus brief in the *Ackerman* case, *supra.*

k. The determination by this Court of lack of jurisdiction to proceed regarding the Fuller affidavit would probably result in the determination of any other issue that may properly be before the court by way of stipulation of the parties or pre-trial conference and without any extended hearing.

Wherefore, it is respectfully submitted that this motion for reconsideration should be granted.

Dated: Honolulu, T. H., this 7 day of November 1955.

HARRIET BOUSLOG, Respondent
By Myer C. Symonds
Myer C. Symonds
Her Attorney

Notice of Motion

To: Edward N. Sylva, Attorney General, Territory of Hawaii, A. William Barlow, Attorney for the Bar Association of Hawaii, and Morio Omori, Deputy Attorney General, Territory of Hawaii:

You, and each of you, will please take notice that the foregoing Motion will be presented before the Supreme Court of the Territory of Hawaii, in its courtroom in the Judiciary Building, Honolulu, T. H., on Monday, November 7, 1955, at 9 o'clock A. M., or as soon thereafter as counsel may be heard.

Dated: Honolulu, T. H., this 7 day of November 1955.

Myer C. Symonds
Myer C. Symonds
Attorney for Respondent

APPENDIX C.

No. 3044

In the Supreme Court of the Territory of Hawaii.

In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an Attorney at Law.

Order of Supreme Court of Territory of Hawaii Denying Motion to Dismiss.

The Motion to Dismiss the Order to Show Cause in the above entitled cause having come on for hearing before this Court on the 3rd day of November, 1955, counsel for the parties herein having submitted memoranda and presented argument, and good cause appearing,

It Is Hereby Ordered that said Motion to Dismiss the Order to Show Cause be and is hereby denied, Chief Justice Edward A. Towse dissenting in part upon the ground that the charges premised upon the Fuller affidavit should be dismissed as an interference with the administration of justice in the United States District Court for the District of Hawaii and a possible usurpation of the power thereof.

Dated: Honolulu, Hawaii, November 29, 1955.

EDWARD A. TOWSE
Chief Justice, Supreme Court
of the Territory of Hawaii

[Seal]

Approved as to form:

MYER C. SYMONDS
Attorney for Respondent

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

Dated, at Honolulu, T. H., Nov. 29, A. D. 1955

GUS N. SPROAT,
Clerk, Supreme Court, Territory of Hawaii